

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHRISTOPHE JOLICOEUR and DEPARTMENT OF JUSTICE,
IMMIGRATION & NATURALIZATION SERVICE, Miami, Fla.

*Docket No. 96-597; Submitted on the Record;
Issued June 11, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant has established that he sustained an emotional condition in the performance of duty.

On April 4, 1994 appellant, then a 40-year-old examiner assistant, filed a claim alleging that on March 24 and 25, 1994 he sustained shortness of breath and chest pain, which affected a heart condition, in the performance of duty.¹ The Office of Workers' Compensation Programs denied appellant's claim by decision dated August 24, 1994 on the grounds that he had not established fact of injury. By decision dated November 7, 1995, an Office hearing representative affirmed the Office's August 24, 1994 decision after finding that appellant had not alleged any compensable factors of employment.

Appellant attributed his emotional condition to harassment by Mr. Albert Kaplan, his acting supervisor. Appellant related that, on December 28, 1992, Mr. Kaplan ordered him to look for a missing roll of legalization forms. Appellant stated that he could not find the forms so he resumed his usual employment, at which time Mr. Kaplan "scolded [him] in a loud voice" for not continuing to look for the "damn" forms. Appellant further stated that Mr. Kaplan screened his incoming telephone calls and told a security guard that appellant could not speak with any attorneys coming into the office. Appellant next related that on March 24, 1994 Mr. Kaplan rudely told him to put a list on the outside of boxes by noon. Appellant stated that he told Mr. Kaplan not to speak to him like that, to which Mr. Kaplan responded that he did not care and still wanted the boxes completed by noon. Appellant related that Mr. Manuel De Jesus, a supervisor, spoke with Mr. Kaplan and himself regarding the incident. Appellant noted that prior to the meeting with Mr. De Jesus he threw up and his blood pressure rose. Appellant stated that Mr. Kaplan made many derogatory comments about Haitians.

¹ Appellant filed a claim for a traumatic injury; however, the Office found that as appellant alleged that his injury occurred over a two-day period the claim was for an occupational disease.

In support of his allegations, appellant submitted a statement dated April 15, 1994 and an affidavit dated May 1, 1995 from Ms. Pamela McCormick, a coworker. Ms. McCormick related that on December 28, 1992 Mr. Kaplan asked appellant to look for extension stickers and when he returned 20 to 30 minutes later yelled and swore at appellant because he had stopped searching for the stickers. Ms. McCormick further stated that Mr. Kaplan told her not to direct attorneys to appellant. Ms. McCormick also indicated that on March 24, 1994 she observed Mr. Kaplan ask appellant if he was refusing a direct order at which time appellant responded that Mr. Kaplan should leave him alone because he was not his supervisor.

The employing establishment also submitted statements from appellant's coworkers and supervisors regarding appellant's relationship with Mr. Kaplan and the March 24, 1994 incident between appellant and Mr. Kaplan. In statements dated April 15, 1994, Mr. Inaki Echenique and Ms. Maranjo related that they had never observed Mr. Kaplan speak to appellant in a loud manner. In a statement dated April 14, 1994, Mr. Michael Wixtet, a coworker, related that he heard Mr. Kaplan and appellant using loud voices and "engaged in a discussion over how and under what authority working instructions were to be carried out." In statements dated April 15, 1994, Mr. Echenique and Mr. Jorge Menendez related that they heard Mr. Kaplan ask appellant in a loud voice whether he was refusing a direct order to which appellant replied that Mr. Kaplan was not his supervisor. Mr. Echenique and Mr. Menendez further related that appellant, in a threatening manner, warned Mr. Kaplan not to tell him what to do. Mr. Kaplan, in a statement dated March 24, 1994, related that he told appellant to put a list on boxes as previously instructed by Mr. Amengual, his usual supervisor, when appellant "exploded making all kinds of remarks." Mr. Kaplan further stated that at the meeting with Mr. De Jesus appellant became agitated and abusive. In a statement dated April 18, 1994, Mr. De Jesus, a supervisor, related that at the meeting on March 24, 1994 appellant began "to talk very loud in an irrational manner" and accused Mr. Kaplan of being a dictator.

The Board has duly reviewed the case record and finds that appellant has not established that he sustained an emotional condition in the performance of duty.

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to his regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.² On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or his frustration from not being permitted to work in a particular environment or to hold a particular position.³

² 5 U.S.C. §§ 8101-8193.

³ See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.⁴ If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.⁵

In the present case, appellant has alleged that he sustained an emotional condition as a result of a number of employment incidents and conditions. The Board must, therefore, initially review whether these alleged incidents and conditions of employment are covered factors under the terms of the Act.

Appellant attributes his emotional condition to harassment by Mr. Kaplan, his acting supervisor, on December 28, 1992 and March 24, 1994. To the extent that disputes and incidents alleged as constituting harassment by coworkers and supervisors are established as occurring and arising from appellant's performance of his regular or specially assigned duties, these could constitute employment factors.⁶ Verbal altercations and difficult relationships with supervisors, when sufficiently detailed by the claimant and supported by the record, may constitute factors of employment.⁷

In the instant case, the evidence does not establish harassment or verbal abuse by Mr. Kaplan. With respect to the incident on December 28, 1992, appellant alleged that Mr. Kaplan loudly asked him why he was not continuing to look for the "damn" forms. Appellant submitted a statement from a witness who verified that Mr. Kaplan swore at appellant on this occasion. Although the Board has recognized the compensability of verbal abuse in certain circumstances, this does not imply that every statement uttered in the workplace will give rise to coverage under the Act.⁸ Appellant has not explained how such an isolated comment by Mr. Kaplan would rise to the level of verbal abuse or otherwise fall within coverage of the Act.⁹ With respect to the incident on March 24, 1994, the statements of appellant's supervisors and

⁴ See *Margaret S. Krzycki*, 43 ECAB 496 (1992).

⁵ *Id.*

⁶ See *Pamela R. Rice*, 38 ECAB 838 (1987).

⁷ *David W. Shirey*, 42 ECAB 783 (1991).

⁸ See *Leroy Thomas, III*, 46 ECAB 946 (1995).

⁹ See, e.g. *Alfred Arts*, 45 ECAB 530 (1994) and cases cited therein (finding that the employee's reaction to coworkers comments such as "you might be able to do something useful" and "here he comes" was self-generated and stemmed from general job dissatisfaction). Compare *Abe E. Scott*, 45 ECAB 164 (1993) and cases cited therein (finding that a supervisor's calling an employee by the epithet "ape" was a compensable employment factor).

coworkers indicate that appellant and Mr. Kaplan engaged in a heated discussion regarding Mr. Kaplan's authority to perform his supervisory functions. The statements of witnesses reveal that appellant was verbally abusive and threatening but do not establish verbal abuse on behalf of Mr. Kaplan. Similarly, at the meeting held among Mr. De Jesus, Mr. Kaplan and appellant following the March 24, 1994 incident, the statements of Mr. De Jesus and Mr. Kaplan indicate that it was appellant who became verbally abusive towards Mr. Kaplan. Thus, appellant has not established a compensable employment factor.

Furthermore, a review of appellant's other allegations and statements from witnesses reveal that appellant's frustration was not related to the performance of his regular or specially assigned duties, but rather to his interactions with his acting supervisor regarding the performance of supervisory functions.¹⁰ An employee's complaints concerning the manner in which a supervisor performs his duties as a supervisor or the manner in which a supervisor exercises his supervisory discretion fall, as a rule, outside the scope of coverage provided by the Act.¹¹ This principle recognizes that a supervisor or manager in general must be allowed to perform their duties, that employees will at times dislike the actions taken, but that mere disagreement or dislike of a supervisory or management action will not be actionable, absent evidence of error or abuse.¹² In the instant case, appellant has not submitted evidence of error or abuse sufficient to substantiate that his supervisor acted unreasonably in the performance of his duties.

As appellant has not submitted the necessary factual evidence to establish that his allegations are compensable under the Act, appellant has not met his burden of proof in this case.

¹⁰ Appellant further alleged that Mr. Kaplan made derogatory comments about Haitians in appellant's presence; however, appellant has submitted no independent evidence corroborating his allegation and thus has not established a factor of employment.

¹¹ *Abe E. Scott*, *supra* note 9.

¹² *Id.*

The decision of the Office of Workers' Compensation Programs dated November 7, 1995 is hereby affirmed.

Dated, Washington, D.C.
June 11, 1998

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member